

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

William and Nancy Nelson

Chapter 7

Debtor(s).

BK 04-33629

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 11:00 a.m. on October 19, 2004, in Courtroom No.228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than October 14, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 7, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

William and Nancy Nelson

Chapter 7

Debtor(s).

BK 04-33629

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 11:00 a.m. on October 19, 2004, in Courtroom No.228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than October 14, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 7, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

3. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this

motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on June 21, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed four claims totaling \$ 185,000.00 secured by a mortgage and a home equity loan on the debtors' homestead and a two vehicles a 1999 Dodge SV Car and a 2003 Hyundai. Debtors plan to retain the vehicles and the homestead
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed no.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed seven claims totaling \$ 60,400.00.

8. The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list a monthly net income of \$ 4,185.00. The debtors are

married and list no dependents. On August 9, 2004, the United States Trustee wrote to the debtors for additional financial information. *See* Att. Ex. 1. The debtors timely responded on August 16, 2004. *See* Att. Ex. 2 (without attachments).

Based on the pay stub for pay period 15^{1/}, William Nelson has the following net income:

YTD Gross	\$ 32,174.75
Less YTD	<u>(9,270.30)</u> taxes and insurance
YTD Net Income	\$ 22,904.45

Year to Date Net Income of \$22,904.45 divided by the 15th pay period = \$ 1,526.97
average per pay period x 26 annual periods = \$39,701.22 divided by 12 months = \$ 3,308.42
average net pay per month.

Nancy Ann Nelson has YTD Net Income of \$ 14,434.47 per pay stub dated 8/6/04, which is the 16th bi-weekly pay period. This amount divided by 16 = 902.16 x 26 pay periods in year = \$23,456.16 divided by 12 months in year = \$1,954.67.

Total Combined Monthly Net Income \$5,263.09

10. On Schedule J, the debtors list monthly expenses of \$ 4,201.00. Certain expenses may be excessive (home maintenance) or relate to debts that would be repaid through a hypothetical Chapter 13 plan (student loans), but it is not necessary to address those expenses at this time.

11. Average net monthly income of \$5,263.09 less adjusted monthly expenses of \$

^{1/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

4,201.00 provides the debtors with monthly disposable income of \$ 1,062.09.

12. Monthly disposable income of \$ 1,062.09 would enable the debtors to pay approximately \$ 38,235.24 or 68% of the unsecured creditors (excluding student loan, which payment has been left on Schedule J) in a hypothetical thirty six month Chapter 13 plan. The debtors can pay 100 % of the unsecured creditors in approximately 52 months.

13. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: September 17, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

IA ATTY No. 14014
(612) 664-5500

EXHIBIT “1”



U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

August 9, 2004

Richard Darby
P.O. Box 617
Winona, MN 55987

Re: William & Nancy Nelson
Bky 04-33629

U.S. Courthouse, Suite 1015

300 South Fourth Street

Minneapolis, MN 55415

612 / 664-5500

FAX 612 / 664-5516

Dear Mr. Darby,

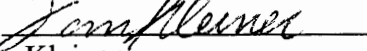
As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. §707(b). Please provide the following documentation/information on or before August 27, 2004;

1. Copies of the debtors' last four pay stubs. If the pay stubs show a deduction for 401(k) or similar retirement plan, please advise if the deduction is voluntary or mandatory. If the pay stubs show a deduction for 401(k) loan repayment, please advise as to the balance of the loan and the estimated payoff date.
2. Copies of 2001, 2002, and 2003 state and federal tax returns, including W-2s, 1099s, and all other attachments and schedules.
3. Copies of bank statements and check registers for the last six months for all accounts owned by the debtors.
4. Copies of receipts, canceled checks, etc., for the last six months of home maintenance expenses (\$250 per month on Schedule J).

Please call if you have a question or concern about this letter. Thank you for your assistance in this matter.

Sincerely,

HABBO G. FOKKENA
United States Trustee

By 
Tom Kleiner
Bankruptcy Analyst

cc: William & Nancy Nelson
1119 West Howard Street
Winona, MN 55987

Charles Ries, Chapter 7 Trustee

EXHIBIT “2”

RICHARD H. DARBY, LTD

Attorney At Law

Shirley A. Gierok
Paralegal

59 West Third • P.O. Box 617 • Winona Minnesota 55987
Telephone No. (507) 452-3341 • Fax No. (507) 452-5071

319 Main Street, Suite 501 • La Crosse, Wisconsin 54601
Telephone No. (608) 796-0031 • (800) 659-1468

RECEIVED

2004 AUG 12 10:37 AM
UNITED STATES DISTRICT COURT
DISTRICT OF WISCONSIN

August 12, 2004

United States Trustee
U.S. Courthouse, Suite 1015
300 South Fourth St.
Minneapolis, MN. 55415

Attn: Mr. Tom Kleiner
Bankruptcy Analyst


RE: WILLIAM GERARD NELSON & NANCY ANN NELSON
CHAPTER 7 BKCY CASE #04-33629

Dear Mr. Kleiner:

Pursuant to your request we enclose the tax returns, bank statements, real estate tax statements, etc. for your review with regard to the above entitled Chapter 7 Bankruptcy Case.

THANK YOU!

Sincerely,


Richard H. Darby

RHD:sg

Enc:

cc: Mr. & Mrs. William Gerard Nelson

VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: September 17, 2004

Signed:

/s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

William and Nancy Nelson

Chapter 7

Debtor(s).

BK 04-33629

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988);

United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with

future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)

See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)

(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay approximately 68% of the general

unsecured creditors in a hypothetical thirty six month Chapter 13 plan or 100% of those creditors in approximately 52 months in a hypothetical chapter 13 plan. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: September 17, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

William and Nancy Nelson

Chapter 7

Debtor(s).

BK 04-33629

CERTIFICATE OF MAILING

I, Terri Frazer, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

That on September 17, 2004 I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

William and Nancy Nelson
1119 West Howard Street
Winona, MN 55987

Richard Darby
PO Box 617
Winona, MN 55987

Charles W. Ries
201 N. Broad Street, #200
P.O. Box 7
Mankato, MN 56002



Office of the United States Trustee
Terri Frazer

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

William and Nancy Nelson

Chapter 7

Debtor(s).

BK 04-33629

ORDER

At St. Paul, Minnesota, this _____ day of _____, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

The Honorable Gregory F. Kishel
United States Bankruptcy Judge